

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PLANTATION BAY, LLC,)	15-CV-2042-(JBS/AMD)
)	
Plaintiff,)	
)	
vs.)	
)	
STEWART TITLE GUARANTY)	
COMPANY, et al,)	Camden, NJ
)	January 17, 2018
Defendants.)	11:03 a.m.

TRANSCRIPT OF TELEPHONIC STATUS CONFERENCE
BEFORE THE HONORABLE ANN MARIE DONIO
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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*** Transcriber's note -- Unidentified Counsel designation had to be used in this document when speaker did not note who he was. Transcriber used context in other instances to determine speaker when not identified.

Colloquy

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1 (The following telephone conference was heard at
2 11:03 a.m.)

3 THE COURT: Good morning, this is Judge Donio.
4 We're on the record for a status conference in Case Number 15-
5 2042. This conference is being electronically recorded and I
6 would ask that each time you speak you identify yourself for
7 the record. Let's begin with plaintiff's counsel.

8 MR. HINDERLITER: Good morning, Your Honor, Chris
9 Hinderliter for the plaintiff.

10 MR. SHERIDAN: Good morning, Your Honor, Tom
11 Sheridan for the plaintiff as well.

12 MR. MANGIARACINA: And Frank Mangiaracina for
13 plaintiff.

14 THE COURT: Thank you.

15 MR. ELIAS: And for the Defendant Stewart Title
16 Guarantee Company, Joshua Elias of Gibbons, PC Your Honor.

17 THE COURT: All right, thank you. I do have a
18 couple letters that the parties have submitted concerning an
19 issue on the attorney-client waiver issue, but before we get
20 to that may I have a status on the factual discovery, please,
21 starting with plaintiff's counsel.

22 MR. HINDERLITER: Sure, Your Honor. At this point
23 in time the Nehmad Firm has completed its response to
24 Stewart's subpoena. As well, the Giordano Firm has completed
25 its response. We currently served subpoena to them. The one

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1 additional issue that is outstanding with respect to the
2 plaintiff's discovery is the question of redactions and we've
3 had documents on the basis of privilege and whether it's --
4 these redactions are of matters involving primary business
5 purpose or involving the legal advice.

6 We did receive a certification from Stewart on
7 Monday and we're expecting a revised privilege log I believe
8 counsel said by early next week.

9 At that point in time we are going to reassess what
10 is happening, Your Honor, and it may be possible -- it may be
11 necessary depending on, you know, what the status of things
12 are at that point in time to move to compel production of
13 certain documents and perhaps remove some of the redactions
14 which are in place. And I think other than starting to
15 schedule depositions, those are the only issues that are out
16 there right now.

17 THE COURT: Well, it's time to get the depositions
18 scheduled and so --

19 MR. HINDERLITER: Yes.

20 THE COURT: -- and so if you still have the
21 privilege issues, you still need to get these depositions
22 scheduled. You'll have to send me a letter obviously before
23 you submit a motion but I need you to continue with the
24 discovery because I don't anticipate extending the fact
25 discovery deadline which as I understand it is currently April

Colloquy

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1 30th, so get your depositions scheduled. It's a --

2 MR. SHERIDAN: Your Honor, this is Mr. Sheridan.

3 THE COURT: Yes. We hear you loud and clear on
4 that. The only concern we have, Judge, is, you know, these
5 documents that are at issue that have been redacted and
6 withheld will be critical to the deposition examinations
7 because it relates to Stewart's -- how they adjusted this
8 claim and how they handled it and their awareness of the title
9 defect.

10 And so, you know, one of these we're being careful
11 about is we don't want to schedule and conduct depositions and
12 then possibly subsequently get additional documents that may
13 require us to re-depose the witnesses.

14 So we've been working together to try and resolve
15 this issue. If we can't, we would probably be able to send a
16 letter next week and if a motion is necessary, get that filed
17 very quickly, Your Honor.

18 THE COURT: When did you get the first privilege
19 log? Because I obviously issued a fair amount of opinions
20 some time ago on these first round of waiver and privilege
21 issue, so what -- when did you --

22 MR. SHERIDAN: I'm not sure, Your Honor, the time
23 line of that, but I can tell you that counsel just un-redacted
24 additional documents and produced them. So this has been
25 ongoing and they have been working, you know, fairly well

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1 together to resolve it. But, you know, there was just an
2 additional production -- I think January 12th perhaps?

3 UNIDENTIFIED SPEAKER: Correct.

4 MR. SHERIDAN: And we're waiting for the redacted
5 privilege log, Your Honor, and you know, we're going to be
6 able to I think make a quick determination whether we need to
7 file a motion over the remaining issues and I think it will be
8 relatively discreet.

9 But I can assure you, Judge, we have been working
10 efficiently and diligently on this and it's been interactive
11 and, you know, as I said it resulted in just last week an
12 additional production.

13 THE COURT: Okay. And maybe defense counsel knows
14 when they sent the first privilege log.

15 MR. ELIAS: Yes, Your Honor -- this is Joshua Elias
16 for Stewart Title -- the first privilege log we sent
17 approximately a year ago.

18 THE COURT: Okay. So that was what I thought
19 because we already had a round of motions so I'm just -- Mr.
20 Sheridan, I hear that you're working through the issues. I
21 don't know what the time line was and whether you raised a
22 concern about the business versus attorney advice issue on a
23 privilege log back a year ago or you just raised it recently
24 and you're working it out.

25 But this is a 2015 case and you're going to have to

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1 get the depositions scheduled. And if there's a privilege
2 problem you need to let me know sooner than later but that
3 doesn't mean I'm going to be able to resolve the motion
4 immediately. You've had the log for a year so I really don't
5 have much choice. It's a 2015 case.

6 MR. SHERIDAN: Okay, I understand. But we hear you
7 loud and clear, Your Honor.

8 THE COURT: Okay. Now, that's just some of the
9 Stewart depositions. What about other people? Is there
10 anybody else being deposed?

11 UNIDENTIFIED SPEAKER: Well, Your Honor, that
12 pertains to -- you know, three or four of the depositions
13 potentially. You know, certainly there's going to be several
14 others and we're going to work with counsel to schedule them
15 as soon as possible.

16 THE COURT: Okay. Other than this privilege log
17 issue -- the privilege issue on a number of documents and I'm
18 not really sure how many we have at issue. What is left for
19 plaintiff besides taking the depositions?

20 UNIDENTIFIED SPEAKER: I don't believe that there's
21 anything besides that, Your Honor.

22 THE COURT: All right. Now from defense. Mr.
23 Elias, are you planning to take any depositions?

24 MR. ELIAS: Yes, Your Honor. We -- just to clarify
25 the status of the subpoenas to the Giordano Firm, the one I

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1 guess marginal production is not entirely complete yet for the
2 time period I believe from January 1, 2009 through 2011. The
3 Giordano Firm is still in the process of gathering those
4 documents so we expect a production from them hopefully in the
5 near future and at that point once we review those documents,
6 we'll be in a position to take the depositions of
7 representatives of Plantation Bay and the Giordano Firm and we
8 will also be looking to take a deposition of Fox Rothschild.

9 THE COURT: All right, well you need to get them
10 scheduled and if you -- you know, you're still awaiting
11 documents and somebody's not being efficient in getting them
12 to you, you'll have to send me a letter, okay?

13 MR. ELIAS: Yes, we will do that, Your Honor.

14 THE COURT: Now other than awaiting the documents
15 from that subpoena and the letter issue -- the issue you
16 raised by letters, or anything else from the defense for
17 discovery purposes?

18 MR. ELIAS: We have a couple of outstanding items
19 that we've written plaintiff's counsel about at the end of
20 2017. Nothing I don't think is ripe to bring to Your Honor's
21 attention right now but it has to do with the email production
22 from Plantation Bay and their -- their privilege log.

23 THE COURT: All right, well again as I indicated to
24 defense -- to plaintiff -- defense, you're on notice as well,
25 that the depositions need to be completed by April 30th and to

Colloquy

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1 send me a letter in February with a motion issue doesn't mean
2 I can turn it around in the next day, given the number of
3 cases the Court manages. So it's time to get these
4 depositions scheduled, it's been a 2015 case as I've indicated
5 and the last bulk of motions took some time because they were
6 very detailed, but the Court had rendered its opinion back --
7 I think it was September, right?

8 UNIDENTIFIED SPEAKER: Yes, the end of September,
9 Your Honor.

10 THE COURT: All right. So we're now three months
11 past that -- four almost, and I still don't hear any
12 depositions having been done so --

13 MR. SHERIDAN: Well, Judge -- and this is Mr.
14 Sheridan --

15 THE COURT: Yes.

16 MR. SHERIDAN: -- you know, in all fairness to the
17 parties, Your Honor, we waited a long time from the District
18 Court Judge to issue his opinion on the motion to dismiss so,
19 you know, there was a lot of briefing time there. It's not as
20 if, you know, discovery has been open for the parties for two
21 years and we've deliberately drug our feet. I just want the
22 Court to be aware of that.

23 THE COURT: No, I --

24 MR. SHERIDAN: There was a long, long -- it was a
25 long, long delay I believe from Judge Simandle, okay, getting

Colloquy

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1 his decision and then the decision was to allow us to file
2 amended complaint -- an amended complaint. There was a
3 subsequent motion to dismiss and then there was a long time
4 for Judge Simandle to issue his opinion on that so, you know,
5 I realize this is a -- you know, 2015 case but at the same
6 time it's not a case where we've been engaged in discovery for
7 two years.

8 THE COURT: No, I understand and, you know, your
9 comments are noted on the record. It's just that as of
10 September of this year we were done with any pending motions.
11 The parties were supposed to be moving expeditiously through
12 discovery and now we're at the end of January and I still
13 don't hear a deposition having been noticed. So --

14 MR. SHERIDAN: Well, Judge, it's a case -- again,
15 just, you know, that we're aware, it's a case that's unusual
16 in that the defendants are seeking discovery of privileged
17 information from prior law firms going back ten years of our
18 clients, and I think that's one of the things that, you know
19 -- and this is a complex case with unusual issues.

20 It's not a simple, you know, breach of contract or
21 slip-and-fall case that we customarily see. So, you know, I
22 just wanted to bring that to the Court's attention. You know,
23 it's a complex litigation matter and, you know, that's what
24 has rendered it to be a little bit more protracted than usual.

25 THE COURT: All right. Well it's time to move it

1 forward. If you don't find that you are receiving a
2 satisfactory answer on the privilege log, send me a letter
3 promptly and let's get dates scheduled for the depositions
4 toward, you know, the end of February and the month of March
5 and the month of April. There's plenty of time to get the
6 discovery done I think.

7 MR. SHERIDAN: We'll do that, Your Honor. We hear
8 you loud and clear.

9 THE COURT: Okay. Now, I have reviewed the letter
10 submissions on the request of the defendants to broaden the
11 scope of the Court's prior ruling and permit additional dead
12 -- dates for the subpoena of documents from the Giordano Firm
13 as it relates to the Court's determination of waiver of
14 privilege. I have read the letters. Is there anything
15 further either party wishes to address to the Court?

16 MR. ELIAS: Yes, Your Honor. This is Josh Elias for
17 Stewart Title Guarantee Company, and I certainly don't want to
18 revisit the arguments that we've made on the record before
19 Your Honor either in the motions or in December.

20 But I -- you know, what we focused on in December
21 was the idea that -- or what Your Honor found in your
22 September 29 opinion, that plaintiff's argument that it relied
23 on Fox Rothschild's advice should be belied by its
24 communications on the same subject with its other retained
25 counsel, and in December we identified what that subject was.

1 It wasn't limited just to the actual settlement
2 agreement document, but to, you know, the advice relating to
3 the substance of it -- what they're agreeing to by settling
4 that matter which was the offer to grant the deed restriction
5 and from limits development on the property.

6 And if that was the substantive scope, the question
7 then is then just when in time -- at what point in time was
8 that advice from the Giordano Firm provided to Plantation Bay.
9 And we initially served a subpoena limited to the creation and
10 execution of the settlement agreements which as we know,
11 didn't bring back the advice relating to those subject
12 matters.

13 At the December conference Your Honor acknowledged
14 that and expanded that time frame to communications leading up
15 to the December, 2007 memorandum of understanding. But in
16 doing so, Your Honor understood that this again may not bring
17 back that advice, so Your Honor expressly stated that if it --
18 if the advice that Stewart Title is entitled to is not in
19 those documents, come back and see me, and so that's where we
20 are now.

21 You know, the previously authorized subpoena brought
22 back a similar document that didn't provide the -- the advice
23 on the deed restriction or the development, so Stewart Title
24 is requesting the Court's authorization for service by a
25 subpoena for this advice between July of 2006 and December of

1 2008.

2 Now, last night Plantation Bay filed their letters.
3 I know Your Honor is reviewing and I just want to address a
4 couple of points made there. Plantation Bay argues that our
5 dissatisfaction with the result of that subpoena is -- doesn't
6 give rise to our right to seek further privileged
7 communications.

8 Well, in fact it does. We're looking for a
9 particular set of communications and if the narrow subpoena
10 that the Court previously authorized didn't capture those,
11 that is precisely the reason Your Honor authorized Stewart
12 Title to come back to the Court.

13 Also, plaintiff claims that, you know, our recent
14 request is I guess back-peddling from a prior position that we
15 took that the 2007 Memorandum of Understanding was the key to
16 the settlement agreement.

17 But Stewart Title has said all along, as we said in
18 the -- in our briefing and in our November letter that leading
19 up to the December hearing, the settlement discussions in the
20 underlying matter were fluid since the inception of the
21 builder's remedy suit and that, Your Honor, I think is made
22 clear in our November 17 -- November 15th, '17 letter at
23 document 83.

24 And as far as the good cause standard that
25 Plantation Bay's counsel identifies, they have argue Stewart

1 Title should have to demonstrate with a reasonable probability
2 that additional responsive documents exist. And normally in a
3 typical case, that's a pretty simple undertaking. You look at
4 the privilege log.

5 But unfortunately here Plantation Bay has failed in
6 both its production preservation efforts and they served a
7 privilege log containing only nine entries despite five years
8 of litigation in the underlying matter, so now we're sort of
9 operating in the dark here and the reason for that lays
10 directly at Plantation Bay's feet.

11 But in any event, you know, I think the documents
12 that are attached to my letter from yesterday and September of
13 2006, November of 2000 (sic) show that that Plantation Bay was
14 contemplating settlement of the builder's remedy suit through
15 a deed restriction or a settlement agreement containing a deed
16 restriction in the time frames requested.

17 And so Stewart Title believes that good cause does
18 exist for the requested subpoena in order to discover facts
19 relating to advice Plantation Bay has placed at issue and
20 which have significant bearing on Stewart Title's defenses in
21 this case.

22 THE COURT: Any response?

23 MR. MANGIARACINA: Yes, Your Honor. This is Frank
24 Mangiaracina on behalf of the plaintiff. Your Honor, at the
25 outset I think this needs to be framed for perspective. This

1 entire dispute arises out of what the Court determined the
2 plaintiff placed at issue and we can't forget that and that's
3 the advice plaintiff claims that Fox Rothschild told us to
4 enter the 2008 settlement agreement.

5 Now Stewart is saying well because that's what Fox
6 Rothschild told us, they should be able to see what Plantation
7 Bay's prior counsel stated regarded entering that settlement
8 agreement, and that's what the Court's September, 2017 order
9 stated, Your Honor.

10 And then in December when we had the status
11 conference, we met to really define the outer limits of that
12 order so extended arguments, extended evaluation by the Court,
13 the Court determined that the negotiations surrounding the
14 Memorandum of Understanding was an appropriate cut off date
15 and so that date was based on the waiver -- the privilege
16 waiver made by plaintiffs.

17 The Court did leave open in fact after studying that
18 date that Stewart may be able to come back and ask for more
19 documents if they show good cause. Now, here what Stewart is
20 saying is that they received one responsive document.

21 However, the fact -- the number of documents that exist
22 in response to a subpoena cannot be the good cause to justify
23 expanding or contracting that subpoena. Your Honor, I mean if
24 you flip this on its head and Stewart and Schneider -- Mr.
25 Schneider came back with 10,000 documents, the plaintiff

1 couldn't come to the Court and say I think this should be
2 narrowed because so many documents were created. And that
3 logic goes both ways.

4 It's because there's no nexus between the
5 justifications underlying the temporal scope of the subpoena
6 and the actual documents that that subpoena turns up after the
7 scope is set. They're totally separate things. The reason
8 you set the time frame for the scope is based on what
9 privilege plaintiff has waived.

10 The documents that the subpoena turns up have no
11 connection to why you set the subpoena to the time frame that
12 Your Honor did. And counsel for -- for Stewart Title argues
13 that they just presume that these documents exist, but the
14 fact that based on the originally authorized subpoena only one
15 documents or one responsive document came back, that undercuts
16 their argument.

17 If only one responsive document came back for the
18 seven months prior to the 2008 settlement agreement, it's
19 highly unlikely that more responsive documents exist regarding
20 the 2008 settlement agreement even further back in time.

21 So in summary, Your Honor, the Court said that
22 Stewart could ask for a broader time frame if they showed good
23 cause and the number of documents produced in response to the
24 first subpoena is not good cause sufficient to justify further
25 infringing plaintiff's privilege.

Elias - Argument

17

1 THE COURT: Okay. Anything further?

2 MR. ELIAS: Yes, Your Honor, Josh Elias for Stewart
3 Title, if I could just briefly respond. I think what counsel
4 is trying to do really is revisit the arguments that we made
5 on December 7th.

6 What Your Honor has already found is it's not just
7 the advice to sign this settlement agreement, it's the
8 substance of the settlement agreement, what the advice --
9 what's contained within the settlement agreement and what's
10 evidence of that is what we already agreed to in the prior
11 subpoena that's set forth in the consent order and it's
12 related to the offer of the deed restriction for the
13 limitation of redevelopment.

14 As far as the number of documents that are captured
15 from a subpoena is not good cause, that's correct. I don't
16 dispute that. Whether it's one or 100 documents that came
17 back, it's the substance.

18 It's the substance of the documents that matter and
19 what we're seeking here is the advice from the Giordano Firm
20 to Plantation Bay relating to the deed restriction or the
21 limitation of redevelopment which was not brought back.

22 But what's important here is that only one document
23 was brought back and what that says is that what we've crafted
24 here is a narrowly tailored subpoena -- without risk of
25 bringing back any other advice that had no bearing on the

1 issue here. So to the extent counsel says that we are
2 presuming that other documents exist and no other documents
3 may exist, well then so be it.

4 Allow us to serve the subpoena and if no more
5 documents come back, then that's the end of it and we'll save
6 our questions for deposition. But they've placed this at
7 issue and because of that, Stewart Title should be entitled to
8 those documents.

9 MR. MANGIARACINA: Your Honor, if I may just be
10 heard briefly on that again?

11 THE COURT: Go ahead.

12 MR. MANGIARACINA: Counsel for Stewart claims that
13 we're attempting to readdress the arguments raised during the
14 December status conference, and in reality, Your Honor, it's
15 Stewart that's readdressing these -- these arguments.

16 This issue was litigated, it was argued and the
17 Court determined that the negotiations undermining -- the
18 negotiations leading up to the Memorandum of Understanding was
19 the appropriate cut off date. So really the key issue now is
20 whether any new information has been uncovered to substantiate
21 the good cause necessary to disrupt the Court's December 7th
22 rule.

23 Stewart talks about the substance of what the
24 subpoena turned up, but there's nothing in the substance of
25 what the subpoena turned up to justify expanding the time

Colloquy

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1 frame and further infringing on plaintiff's privilege to go
2 fishing for more documents that no good cause is demonstrated
3 may exist.

4 I mean, the fact of the matter is that all privilege
5 waivers need to be narrowly construed and if Stewart keeps
6 coming back and pushing and pushing and pushing further back,
7 you know, it's really bending the limits of this -- of this
8 requirement that the waivers be narrowly construed beyond its
9 limits, Your Honor.

10 THE COURT: Well, maybe we should do it this way.
11 I'm looking -- the December 13th, 2007 letter that Mr.
12 Schneider produced, this is the only letter, correct?

13 MR. ELIAS: Yes, Your Honor.

14 THE COURT: And it's Exhibit A to document -- or to
15 the letter dated January 16th, 2017, correct?

16 MR. ELIAS: Yes, Your Honor.

17 THE COURT: And so Mr. Schneider -- and he's still
18 at the Giordano Firm, right?

19 MR. ELIAS: Yes, Your Honor.

20 THE COURT: All right. So he's responding to the
21 subpoena and he's viewing this letter as responsive to any
22 communications concerning the December 28th, 2007 Memorandum
23 of Understanding, correct?

24 MR. ELIAS: It appears so, yes.

25 THE COURT: And there's been no other production

Elias - Argument

20

1 that he viewed as -- in his documents -- as concerning the
2 Memorandum of Understanding, so let me point this to Stewart's
3 counsel first. I'm looking at the consent order. There was
4 no deadline that or no restriction in his review that said the
5 document had to be dated a certain date except for the end
6 date, correct?

7 MR. ELIAS: That's correct.

8 THE COURT: So why --

9 MR. ELIAS: It was relating --

10 THE COURT: So why --

11 MR. ELIAS: I'm sorry, go ahead, Your Honor.

12 THE COURT: So it says negotiations concerning the
13 Memorandum of Understanding that relate to the deed
14 restriction or offer -- or grant of a restriction, so what is
15 your basis to conclude that there are other documents even if
16 we draft it the way you wish me to revise the subpoena order?

17 MR. ELIAS: Well, Your Honor, the -- as you see in
18 Exhibit C and Exhibit D, there were offers from Plantation Bay
19 to settle this builders remedy suit early on in this
20 litigation to -- that would include a limitation on
21 development and an offer to -- for a deed restriction, and
22 whether the City of Somers Point at that point in time felt it
23 was in their best interest to agree to that is neither here
24 nor there.

25 Ultimately I guess in 2008 they thought or with the

1 Memorandum of Understanding in 2007 they ultimately signed
2 something that's substantially similar, but the advice that
3 the Giordano Firm provided to Plantation Bay about making that
4 offer would -- very well happens much earlier than just when
5 they ultimately signed the Memorandum of Understanding.

6 As you can see in Exhibit C, there's a November,
7 2006 draft settlement agreement signed by Plantation Bay which
8 includes the deed restriction and the limitation on the
9 redevelopment, presumably things -- advice from counsel about
10 whether it was in Plantation Bay's best interest to enter that
11 and to do that at that point in time.

12 And by providing that agreement -- that by providing
13 that advice in 2006, that likely followed along to -- you
14 know, when they ultimately made that offer again in 2007 from
15 the Memorandum of Understanding and ultimately signing the
16 settlement agreement in 2008.

17 THE COURT: Are you planning to take his deposition?

18 MR. ELIAS: Yes, Your Honor.

19 THE COURT: So you don't really know whether the
20 advice that you're seeking was given by verbal communication,
21 correct?

22 MR. ELIAS: I do not.

23 THE COURT: So it may be that there's a lack of
24 letters because all the discussions were by phone or in
25 person.

Sheridan - Argument

22

1 MR. ELIAS: It could be, Your Honor, but at the same
2 time, you know, like I said earlier, typically we'd have the
3 benefit of a privilege log and we don't have that here and
4 Plantation Bay's failure to provide an adequate privilege log
5 here shouldn't be visited on Stewart Title and prevent us from
6 getting documents that we would otherwise be entitled to.

7 THE COURT: All right. Just remind me why
8 Plantation doesn't have the documents.

9 MR. ELIAS: That I don't -- I can't answer that
10 question for you, Your Honor. I don't know.

11 MR. MANGIARACINA: Your Honor, we produced all the
12 documents we had and we claimed privilege for the privileged
13 documents. Whatever Mr. Schneider's producing in response to
14 his subpoena has absolutely nothing to do with our privilege
15 log or the documents that we produced in discovery.

16 THE COURT: Well, the question is if Mr. Giordano
17 had the document, why didn't your client have the document and
18 did it show up in the privilege log.

19 MR. SHERIDAN: Well, Judge, this is Mr. Sheridan.
20 If Mr. Giordano doesn't have the document and he still works
21 at that firm and preserved his file, why would we presume that
22 the principals of Plantation Bay would have them?

23 THE COURT: No, I --

24 MR. SHERIDAN: I mean, it's a preposterous argument
25 by Mr. Elias. I mean it's just absurd.

Colloquy

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1 THE COURT: I'm going to ask you to answer my
2 question that I'm talking about, the December 13th letter,
3 2007. Did that show up on Plantation Bay's privilege log?

4 UNIDENTIFIED SPEAKER: Your Honor, I don't believe
5 that it did.

6 UNIDENTIFIED SPEAKER: But, Your Honor, I don't know
7 necessarily if Plantation Bay produced that in their
8 production.

9 THE COURT: I would just ask you to speak your name
10 when you speak because I'm having a hard time figuring out who
11 just said that.

12 MR. MANGIARACINA: I apologize, Your Honor. This is
13 Frank Mangiaracina.

14 THE COURT: Yes. So the question really is is there
15 other documents between Plantation Bay and Mr. Giordano that
16 discuss the deed restriction and advice about a deed
17 restriction that were a part of the formation of the decision
18 to enter into the Memorandum of Understanding. That's what
19 Stewart is looking for, correct, Mr. Elias?

20 MR. ELIAS: Well, Your Honor, I think it would be --
21 you know, whether it -- yes and no. To limit it just to the
22 Memorandum of Understanding I think might unnecessarily narrow
23 this. Ultimately yes, that did lead to the Memorandum of
24 Understanding, but the extent, you know, there is advice
25 relating to the November, 2006 settlement agreement which

Colloquy

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1 contains those same terms, I think that's -- that's the same
2 advice.

3 THE COURT: Well yes, but I've already ruled on that
4 so I'm saying to the extent that -- for example, let's play it
5 out. Mr. Schneider -- I'm looking at his letter and he says
6 "I repeat my" -- "I repeated my view." Well, when did he
7 first give the view that the deed restriction is more of a
8 political issue than a legal issue?

9 I don't know when he repeated it. But he clearly --
10 the way he addressed this is as follows. Let's permit a -- so
11 first of all, Mr. Giordano's letters to Plantation Bay can be
12 obtained directly from Plantation Bay, correct?

13 MR. MANGIARACINA: Yes, Your Honor.

14 THE COURT: So you should --

15 MR. MANGIARACINA: To the extent --

16 THE COURT: So you should have them and you could
17 put them on a privilege log.

18 MR. MANGIARACINA: Your Honor, everything that --
19 everything that was determined to be waived -- the waiver of
20 privilege based on the September opinion has been produced.
21 We reevaluated our privilege log in light of that opinion.
22 Everything in our possession that's responsive and relevant
23 has been produced. So to the extent that any of those
24 documents exist, Stewart has them.

25 THE COURT: No --

Colloquy

25

1 MR. ELIAS: Your Honor, they're -- Your Honor, Josh
2 Elias from Stewart Title -- there are nine entries on the
3 privilege log. We have never received a single document from
4 Plantation Bay following Your Honor's ruling. The documents
5 that we've received from the Giordano Firm in response to the
6 subpoenas authorized as a result of Your Honor's September 29
7 opinion retrieved documents that we have never seen before.

8 THE COURT: Okay. So that's the issue that Mr.
9 Elias is raising -- why aren't these same letters on the
10 privilege log of Plantation Bay.

11 MR. MANGIARACINA: Your Honor, it's because
12 Plantation Bay doesn't have them.

13 THE COURT: Okay, so call Mr. Giordano up and get
14 them from him. It's within your custody, control and
15 possession to obtain documents from your -- your former
16 attorney, correct?

17 I mean, why should we be talking in the abstract?
18 We really should know whether there are five or six other
19 letters that relate to the deed restriction and then you take
20 the --

21 MR. SHERIDAN: Judge, from what time period -- this
22 is Tom Sheridan -- from what time period?

23 THE COURT: Okay --

24 MR. SHERIDAN: Because I'm lost, I'm not following
25 what --

Colloquy

26

1 THE COURT: All right, so look, I can't -- let me
2 ask you this question. You have three different plaintiff's
3 lawyers so you need to designate one person who's going to
4 address the Court on these issues and that's fine, it doesn't
5 matter to me who it is, but I can't really have three
6 different lawyers arguing the case.

7 MR. SHERIDAN: Judge, I'm not arguing the case, I'm
8 just trying to understand -- this is Tom Sheridan. Mr.
9 Mangiaracina will answer your questions, Judge, but I'm just
10 -- you're saying -- I'm not sure for what time period you want
11 to go back in time. I don't understand that question, that's
12 all.

13 THE COURT: Let me rephrase it this way. The Court
14 issued an order and permitted a subpoena to be issued. Mr.
15 Giordano produced one document in response to that subpoena.
16 The question becomes where -- why that document was never
17 produced by Plantation Bay.

18 That's issue number one. And you say well,
19 Plantation Bay didn't have the documents. Well, I'm just
20 wondering whether you've obtained the file of the relevant
21 documents from Giordano yourself, because we shouldn't be
22 operating in the abstract of whether the documents exist or
23 don't exist. What we should be doing is dealing with whether
24 the privilege has been waived for that period of time or not.
25 That --

Mangiaracina - Argument / Elias - Argument

27

1 MR. MANGIARACINA: Your Honor -- excuse me.

2 THE COURT: I have to know who is speaking.

3 MR. MANGIARACINA: This is Frank Mangiaracina for
4 plaintiffs. Just to address your two points, we have not
5 requested the file from -- from Giordano Firm, nor have we
6 interfered in his compliance with the subpoena. The reason we
7 -- the documents we produced were in the possession, custody
8 and control of Plantation Bay.

9 We did not affirmatively go to Giordano Firm and
10 request his file from the underlying litigation, and that
11 could explain the disparity between the documents he's
12 producing and the documents produced by plaintiff.

13 MR. ELIAS: Your Honor, this is Josh Elias for
14 Stewart Title. The documents that we're seeking are documents
15 between the Giordano Firm and representatives of Plantation
16 Bay, so they should be documents that Plantation Bay had in
17 its possession, and now they're saying they don't have those
18 documents in their possession yet at the same time, they're
19 telling us that we shouldn't be entitled to ask the Giordano
20 Firm for these documents that we are otherwise entitled to.

21 MR. MANGIARACINA: Your Honor, this is Frank
22 Mangiaracina. I would like to address that in two parts. The
23 first part is that there's one document that plaintiff did not
24 have in their possession that was handed over by the Giordano
25 Firm. That does not mean by any measure that other documents

1 exist.

2 As we stated, we produced everything we have. And
3 more importantly, we're not stating that the documents -- the
4 privilege documents for which the waiver has been -- the
5 privilege has been waived -- we're not arguing that they
6 shouldn't be produced.

7 Rather, we're arguing that -- we're contending that
8 this issue has been litigated, has been resolved by the Court
9 and a window for the privilege waiver has been set and Stewart
10 has not demonstrated the good cause necessary to extend that
11 window.

12 And the fact that Mr. Giordano's firm may have one
13 document that plaintiff did not have in its possession,
14 custody or control does not justify extending a privilege
15 waiver window from seven months to two years when the rules
16 require and the law requires that all waivers be narrowly
17 tailored to the actual subject matter placed in issue.

18 MR. ELIAS: Your Honor, Joshua Elias for Stewart
19 Title. It is not just one document that we've identified that
20 has not been produced by Plantation Bay. As Your Honor
21 recalls, the initial subpoena that resulted from Your Honor's
22 September 29 opinion that ultimately led to our December
23 conference brought back additional documents that were not
24 part of Plantation Bay's production.

25 And additionally, again, there were only nine

Ruling by the Court

29

1 entries on their privilege log from an underlying litigation
2 in which the Giordano Firm was primarily involved for over
3 five years. It's just patently unreasonable for that to be
4 the only documents that are there.

5 THE COURT: All right. Here's what I'm going to do.
6 I'm going to let you, Mr. Elias, take a deposition of Mr.
7 Giordano and you can ask him what advice he gave to the
8 plaintiffs -- Plantation Bay with respect to the December
9 28th, 2007 memorandum, and then you can ask him whether the
10 advice he gave was repetitive or did he in any way incorporate
11 prior advice.

12 And if the answer is yes, then I may order the
13 additional documents. If he says no, all the advice that I
14 gave with respect to this particular memorandum is -- was
15 verbal and here it was plus this letter, that's one thing.

16 On the other hand, if he says it was a process, we
17 built on it, they knew my views about the deed restriction and
18 the builder's remedy and, you know, I talked them -- you know,
19 numerous times, well then that's going to be good cause to
20 you, go back and get those documents and I'll let you re-
21 depose him, okay? Let's get his deposition first.

22 MR. ELIAS: Understood, Your Honor.

23 MR. SHERIDAN: So, Your Honor, this is Mr. Sheridan.
24 For clarification, right, I think what I understand the
25 Court's ruling to be is that Mr. Elias is going to be able to

Ruling by the Court

30

1 ask our client's attorney to waive his privilege and testify
2 about any discussions whatsoever from any point in time about
3 their state of mind in attempting to settle this litigation?

4 THE COURT: Mr. Sheridan, you paraphrased completely
5 incorrectly what the Court just said, so maybe you should
6 order the transcript, but what I'm allowing Mr. Elias to do is
7 do an inquiry of the -- within the same scope as the prior
8 order.

9 But if Mr. Giordano says this was my advice, then
10 the next question is and was the advice -- did you in any way
11 repeat or rephrase or otherwise incorporate prior advice, and
12 if his answer is yes, that's going to potentially open the
13 door to the prior advice.

14 MR. SHERIDAN: I understand, Your Honor. I'm sorry.

15 THE COURT: Mr. Elias, you understood the Court's
16 order from the bench?

17 MR. ELIAS: I do, Your Honor.

18 THE COURT: Okay. So I hope I don't get any calls
19 about the deposition, but please feel free to make sure the
20 date you schedule the deposition of Mr. Giordano is a date
21 that I'll be available for calls, okay?

22 MR. ELIAS: Yes, Your Honor.

23 MR. MANGIARACINA: Yes, Your Honor.

24 THE COURT: All right. Is there anything else then
25 for today?

1 MR. ELIAS: No, Your Honor, that is all from
2 defendant.

3 THE COURT: All right, counsel, you all have a good
4 day. We are adjourned.

5 ALL COUNSEL: Thank you, Judge.

6 (Matter concluded, 11:42 a.m.)

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11 C E R T I F I C A T I O N

12
13 I, Diane Gallagher, the court approved transcriber,
14 certify that the foregoing is a correct transcript from the
15 official electronic sound recording of the proceedings in the
16 above-entitled matter.

17
18 _____
19 DIANE GALLAGHER

DATE

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